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No. 01-1446

IN THE

Supreme Court of the United States

PAUL FORMAN,
Petitioner,

v.

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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The Solicitor General affects a back-of-the-hand approach to this case, suggesting that it is a routine, fact-bound affirmance of summary judgment. It is not.

The Court of Appeals flouted the method for assessing pretext that this Court has carefully fashioned over three decades in such cases as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Because the appellate court's disregard of this precedent cannot be defended, the government does not attempt to do so. Instead, it simply pretends that nothing is amiss.

In fact, the approach to pretext taken by the Court of Appeals requires correction. This can be accomplished either through full proceedings on the merits or, if the Court deems it appropriate, through summary reversal.

I.

This Court has emphasized that the plaintiff's initial burden to establish a prima facie case of discrimination is "not onerous." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Nor is the defendant's responsive burden to articulate a legitimate, nondiscriminatory reason for the challenged conduct. *Id.* at 254-55. The heavy lifting comes after both preliminary burdens have been satisfied, when the plaintiff has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Id.* at 256. And if the plaintiff succeeds in this endeavor, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 147 (emphasis in original).

In trying to prove pretext at the third stage of this analytical framework, the plaintiff has not "expended"—like so much ammunition—the evidence that he brought forward at the first stage. The slate is not wiped clean. On the contrary, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Reeves*, 530 U.S. at 143, *quoting Burdine*, 450 U.S. at 255 n.10.

In the present case, however, the Court of Appeals treated each of the three stages of proof as hermetically sealed. This was fundamental legal error—the same error condemned in *Reeves*, where "the Court of Appeals ignored the evidence supporting petitioner's prima facie case." 530 U.S. at 146. Here as well, the Court of Appeals first cited a wealth of

proof when considering petitioner's prima facie case—including both unchallenged statistics and comments redolent of age bias, Pet. App. 10a-11a—then ignored all this evidence in assessing pretext. *Id.* at 12a-13a.

Perhaps unwittingly, the government replicates this error, saying that petitioner did "not satisfy his burden of production because he did not come forward with *any evidence* to suggest that the reason articulated for his not getting the promotion was pretextual." Brief in Opposition (Br. Opp.) at 9 (emphasis added). That is just not so. Under *Reeves*, the proof amassed in support of petitioner's prima facie case also qualifies as evidence of pretext.

In addition, petitioner separately advanced other probative evidence. Most telling, he showed that the government's central argument—that he had not fulfilled his performance plan—was simply wrong. For the performance year ending August 31, 1990, the principal element in petitioner's performance plan was the preparation of a book on atomic clocks. And his supervisor said that the "commendable draft chapters" that petitioner had written, Pet. App. 61a, "constituted successful performance of this element." *Id.* at 63a (Column III). He did not thereafter complete the book, which had evolved into a biography of Charles Townes, but it is undisputed that this was because "Townes was refusing access to his papers." *Id.* at 12a.

The government imagines evidence of pretext that petitioner might have offered, "for example, [that] he was fully engaged in curatorial responsibilities even as he attempted to write the proposed book, and thus should not have been denied a promotion." Br. Opp. at 9. Certainly this would have been solid proof of pretext, but "[t]he evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms." *Patterson*, 491 U.S. at 187. And the government's hypothetical is no more powerful than the true reason,

namely, as the Court of Appeals itself states, that petitioner was unable "to finish his Townes manuscript because of factors beyond his control." Pet. App. 12a.

In fact, the government is more lenient in its evidentiary standards than the Court of Appeals. For the court, the fact that no book was produced ended the inquiry: "Unless [petitioner] could show that he had fulfilled the central purpose of his sabbatical and performance plans [*i.e.*, writing a book], he cannot show that Secretary Adams' reason for denying his promotion was pretextual." Pet. App. 12a. Here the court disregards the fact that petitioner's supervisor believed that he *had* fulfilled the primary element in his performance plan. But the more essential point is that the court's draconian formulation admits of no exception, not even the government's hypothetical about weighty curatorial responsibilities.

Given the appellate court's ruling, petitioner said that the court had viewed the Smithsonian's explanation for the promotion denial "as unassailable by any means other than direct demonstration of its falsity." Pet. 8. The government of course takes exception, Br. Opp. 9, knowing that such an approach to pretext would be indefensible. *See Patterson*, 491 U.S. at 187. Nevertheless, this is exactly what the court did.

II.

As additional evidence of pretext—beyond the statistics correlating promotion with youth and the age-laden comments, both of which also supported petitioner's prima facie case, *and* his supervisor's assessment that petitioner's work in 1990 "constituted successful performance" of his book-writing assignment, *and* proof that he could not finish the book "because of factors beyond his control"—petitioner also offered comparative evidence. He showed that other, younger curators were not required to complete a book as a

condition of promotion. But the Court of Appeals refused to consider this as well, and the refusal was expressly grounded on the noncompetitive nature of the promotion at issue: "Dr. Forman's task is more difficult to the extent he is competing against himself. That the promotion of others did not depend on completion of a book is *irrelevant* to Dr. Forman's particular promotion decision." Pet. App. 13a (emphasis added).

Petitioner said that the question presented by this petition is "[w]hether a discrimination case involving noncompetitive promotion should be subject to more restrictive standards of proof than one involving competitive promotion." To be sure, the Court of Appeals did not baldly state that it was subjecting noncompetitive promotions to more stringent standards of proof than would apply to competitive advancement, but that is precisely what it did. And so the court called petitioner's comparative evidence "irrelevant," even though such proof has been a staple of discrimination litigation since this Court first said nearly 30 years ago that it was "[e]specially relevant" to the assessment of pretext. *McDonnell Douglas*, 411 U.S. at 804.

In fact, comparative analysis is frequently essential in determining whether particular personnel actions were animated by prohibited bias, regardless of whether the actions were competitive *or* noncompetitive. *See University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 193 (1990) (peer review materials relating to professors granted tenure were relevant in a suit alleging discriminatory tenure denial); *McDonnell Douglas*, 411 U.S. at 804 ("[e]specially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired").

The government understands very well that the Court of Appeals erred in barring comparative evidence, and so simply

denies that it did so. In the courts below, though, the government emphatically argued that "noncompetitive implies noncomparative." *See, e.g.*, the parties' Joint Appendix (JA) in the Court of Appeals at 523 ("[w]hen Dr. Forman was considered for promotion, he was competing against himself. * * * Consequently, the relative qualifications [of others] are not relevant"), 507 (same). Both the district court, JA 58, and the Court of Appeals, Pet. App. 13, adopted this erroneous view. This was not adventitious but instead was the inevitable product of the argument urged by the government, any pretense to the contrary notwithstanding.

III.

In 1991 Robert Hoffman, the Assistant Secretary in charge of research at the Smithsonian, lobbied for petitioner's promotion, citing laudatory reviews by distinguished scholars from such institutions as California Institute of Technology, Duke University, Johns Hopkins University, University of California at Berkeley, University of California at Irvine. Pet. App. 65a-76a. Hoffmann concluded that "someone who is clearly considered by the best of his peers as one of the best historians of modern science, both in his scholarly writings and in the exhibitions he has curated, is deserving of a grade 14." *Id.* at 78a.

It would never be proper for a court to employ an erroneous legal standard to dismiss a complaint. But especially in circumstances such as these, where an exceptionally well qualified EEO plaintiff lost on summary judgment, it was vital for the Court of Appeals to follow this Court's instructions on pretext in determining whether a rational trier of fact could have found for petitioner, after "draw[ing] all reasonable inferences in [his] favor." *Reeves*, 530 U.S. at 150.

As has been shown, however, the Court of Appeals departed radically from the pretext regime established by this

Court in *McDonnell Douglas*, *Patterson* and *Reeves*. In particular, the court, in assessing pretext, (1) did not permit petitioner to rely on comparative evidence, in contravention of *McDonnell Douglas*, 411 U.S. at 804, (2) narrowly circumscribed petitioner's proof of pretext by ruling that he could discredit the Smithsonian's explanation *only* by showing that he had written a book, thereby flouting *Patterson*, 491 U.S. at 187, and (3) disregarded the evidence marshaled by petitioner in support of his prima facie case, contrary to this Court's teaching in both *Reeves*, 530 U.S. at 143, and *Burdine*, 450 U.S. at 255 n.10.

In addition, the Court of Appeals erroneously conflated the truth of one assertion—that petitioner had not written a book—with the truth of the government's very different assertion that the lack of a book motivated the promotion denial. In *Hunt v. Cromartie*, 526 U.S. 541, 548 (1999), this Court noted that the issue of unlawful motivation may not be susceptible of resolution on summary judgment even if the underlying facts are undisputed, because "motivation is itself a factual question." *Hunt*'s message is especially pertinent here, where there is abundant evidence of pretext under *McDonnell Douglas*, *Patterson* and *Reeves*.

In *Reeves*, this Court simply reaffirmed the unmistakable lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), specifically that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *See Reeves*, 530 U.S. at 147. This is a straightforward point, but some courts even after *Hicks* were requiring direct evidence of bias, so *Reeves* was needed to emphasize that the Court meant what it said.

Similar reiteration is necessary here, where the Court of Appeals has strayed far from this Court's path on pretext. In these circumstances, the Court may wish to consider the propriety of summary reversal.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Petitioner